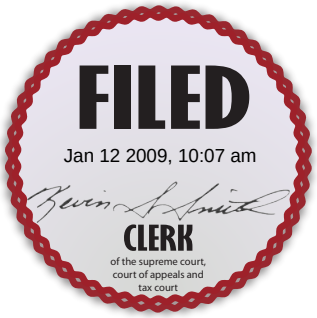

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IN THE
COURT OF APPEALS OF INDIANA

DONALD DOTY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0803-CR-208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William E. Young, Judge
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0610-FA-206375

January 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Donald Doty was convicted after a jury trial of dealing in cocaine[1] as a Class A felony and was sentenced to thirty years. He appeals, raising the following restated issues:

I. Whether the trial court abused its discretion when it allowed evidence to be admitted at trial that had been seized by the police from Doty's home during a warrantless entry;

II. Whether the trial court abused its discretion by failing to suspend a portion of his sentence and by using improper aggravating circumstances; and

III. Whether Doty's sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 24, 2006, Officer Monica Hodge of the Indianapolis Police Department responded to a report of a burglary in which a safe containing firearms was stolen. The victim of the burglary thought that his son was responsible for the theft and told Officer Hodge that she may be able to find his son at Doty's house. Officer Hodge obtained an arrest warrant for the victim's son and proceeded to Doty's house with two other officers, Officer Jeffrey Widmer and Officer Bryan Neal.

The officers arrived at Doty's house at approximately 6:24 p.m., and Officers Hodge and Widmer went to the front door while Officer Neal covered the back door. Doty's house had a glassed-in front porch with a screen door. Next to this screen door on the outside of the porch was a doorbell, which did not have a button. Officers Hodge and Widmer entered the front porch and knocked on the main front door. Officer Widmer announced, "Police," and

[1] *See* Ind. Code § 35-48-4-1.

someone inside the house said, "Who?" to which Officer Hodge replied, "Monica, IPD." *Tr*. at 43. At that time, someone opened the door.

With the front door opened, Officer Hodge, who was standing on the right side of the door, could see inside the house and observed eight to ten people, including Doty's eighteen-month-old son and his wife's ten-year-old brother. She could also see a small nightstand, which was up against a wall of the front living room. On top of this night stand, there were two guns, a .40 caliber semi-automatic handgun and a Tec-9 semi-automatic handgun with a 30-round magazine. Doty was seated at the far end of the couch, which was immediately to the left of the front door and within a few feet of the nightstand. Doty began to reach into the drawer of the nightstand, and Officer Hodge entered the residence and told Doty to "get back." *Id*. at 45. She told all of the occupants of the house to put their hands up, and she removed the guns from the top of the nightstand.

At the same time, Officer Widmer, who had a direct view to the back of the house, saw two women standing in the dining room holding handguns. The two women "made a freezing movement like a deer in headlights kind of motion." *Id*. at 98. When Officer Hodge entered the house, Officer Widmer followed her. Two juveniles ran to the rear of the house. Officer Widmer made the women drop the handguns and place them on the dining room table. He then ran to catch the fleeing juveniles and brought then back into the living room. He secured the two handguns, which were both nine-millimeter semi-automatic weapons, and gave them to Officer Hodge.

After entering the house, Officer Hodge observed two rifles, a .22 caliber and an SKS assault rifle, leaning against the wall behind the couch near where Doty was seated. All of the weapons, each of which was loaded, were taken out to a table on the front porch. When Officer Hodge entered the house, she also noticed a digital scale, a razor blade, and a box of plastic baggies on top of the nightstand. When she looked inside of the drawer where Doty had been reaching, she found plastic baggies, which contained a rocklike substance. Additionally, when Officer Hodge was retrieving the two rifles from behind the couch, she observed a plastic baggie on the ground between the couch and the wall near Doty's foot, which contained a rocklike substance. It was later determined that the baggies found in the drawer contained .8389 grams of crack cocaine, and the baggie found on the floor contained 24.1251 grams of crack cocaine.

The State charged Doty with dealing in cocaine as a Class A felony, possession of cocaine as a Class A felony, and possession of cocaine and a firearm as a Class C felony. Doty filed a motion to suppress the evidence seized at his home, which the trial court denied. A jury found Doty guilty of all three counts. At sentencing , the trial court, citing double jeopardy concerns, entered judgment only on Doty's conviction for dealing in cocaine as a Class A felony. As aggravating circumstances, the trial court found that the crime was committed in the presence of children, the nature of the firearms involved, and his lack of candor to the tribunal in that Doty admitted in his presentence investigation that he had committed the crime, but had consistently denied it during his trial testimony. *Id*. at 18-19. The trial court found Doty's lack of a criminal history to be a significant mitigating

circumstance. Finding that the aggravating and mitigating circumstances were of equal weight, the trial court sentenced him to thirty years executed. Doty now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

In cases such as this one where Doty originally filed a motion to suppress the evidence, but appeals following the admission of the evidence at trial, we frame the issue as whether the trial court abused its discretion by admitting the evidence. *Smith v. State*, 889 N.E.2d 836, 839 (Ind. Ct. App. 2008). An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Boney v. State*, 880 N.E.2d 279, 289 (Ind. Ct. App. 2008), *trans. denied*. In making this determination, we do not reweigh the evidence and consider conflicting evidence in a light most favorable to the trial court's ruling. *Smith*, 889 N.E.2d at 839. We also consider uncontroverted evidence in the defendant's favor. *Id*.

Doty argues that the trial court abused its discretion when it admitted the evidence discovered at his house after the police made a warrantless entry. He contends that the admission of evidence was an abuse of discretion under both the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Specifically, under the Fourth Amendment, Doty claims that the officers illegally entered the curtilage of his home by failing to use a doorbell located next to the door of the glassed-in porch, and he alleges that no exigent circumstances existed that permitted the officers' warrantless entry of his residence. Further, under the Indiana Constitution, Doty argues that

the officers' entry was not reasonable under the totality of the circumstances because the officers had not observed any illegal activity prior to their entry, they could have obtained a search warrant, and the degree of intrusion imposed upon his activities was extensive.

A. Fourth Amendment

The Fourth Amendment protects persons from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. U.S. Const. amend. IV; *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001); *Smith*, 889 N.E.2d at 839. Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind. 2005). When a search or seizure is conducted without a warrant, the State bears the burden of proving that an exception to the warrant requirement existed at the time of the search or seizure. *Id*.

Doty initially argues that the police illegally entered the curtilage of his home when they failed to use a doorbell located beside the door to the glassed-in porch and instead knocked on the main front door of the house. The land immediately surrounding and associated with a home is the curtilage and merits the same Fourth Amendment protection that attaches to a home. *Holder v. State*, 847 N.E.2d 930, 936 (Ind. 2006). No unreasonable search occurs when police enter areas of curtilage impliedly open to use by the public to conduct legitimate business. *Hardister v. State*, 849 N.E.2d 563, 570 (Ind. 2006). Legitimate business includes a "knock and talk" where the police use normal routes of ingress and egress from a residence to make appropriate inquiries of the occupants. *Id*.

Here, the police went to Doty's home to investigate a burglary complaint because the victim said that the suspect and the stolen guns may be found there. When they arrived at Doty's residence, Officers Hodge and Widmer walked into the glassed-in porch to knock on the main front door. Although Doty alleges that the doorbell outside of the porch was operable, the facts most favorable to the trial court's ruling showed that the doorbell was in fact broken. Officer Hodge testified that there was no button and that there was only a plastic piece screwed into the house where a doorbell had once been. *Tr*. at 39-40. After determining that the doorbell was inoperable, the officers continued to the front door in the same manner as any visitor would. Therefore, there was no unreasonable search when the police entered the porch to knock on the front door as they were there for legitimate business -- to talk to the occupants -- and they used a normal route of ingress and egress.

Doty next contends that the warrantless entry of the police was not justified because no exigent circumstances existed. "The warrant requirement becomes inapplicable where 'exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'" *Holder*, 847 N.E.2d at 936-37 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290, 301 (1978)). Among the exigencies that may properly excuse the warrant requirement are threats to the lives and safety of officers and others and the imminent destruction of evidence. *Id*. at 937. "Law enforcement may be excused from the warrant requirement because of exigent circumstances based on concern for safety as long as the

State can prove that a delay to wait for a warrant would gravely endanger the lives of police officers and others." *Id*.

Here, when the officers knocked on the door and identified themselves, someone from inside of the house opened the door fully exposing the interior of the home. Immediately, the officers saw at least eight to ten people inside of the residence, some of whom were juveniles. Officer Hodge observed a nightstand upon which were two handguns, and she saw Doty reaching into the drawer of this nightstand. Officer Widmer observed two juveniles start running to the back of the house and two women, each with a handgun, standing in the dining room. Therefore, when the door was opened, the officers immediately saw a scene where they were outnumbered, people were armed, some people were running to the back of the house, and Doty was reaching into a drawer of a table upon which were two guns. These circumstances, from the vantage point of the police, were threatening to their safety unless they acted quickly to gain control over the situation. Further, it was not feasible for them to wait for a warrant because the circumstances demonstrated the need to immediately secure the situation. We conclude that, under the Fourth Amendment, the warrantless entry into Doty's house was justified, and the trial court did not abuse its discretion in admitting the evidence.

B. Article 1, Section 11

Doty claims that the officers' warrantless entry into his house violated Article 1, Section 11 of the Indiana Constitution and was unreasonable under the totality of the circumstances. Our analysis of claims under Article 1, Section 11 does not demand that we

examine the same requirements as under a Fourth Amendment analysis. *Holder*, 847 N.E.2d at 940. Under the Indiana Constitution, the legality of a governmental search turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). Our Supreme Court has explained reasonableness of a search or seizure as turning on a balance of: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. *Id*. at 361.

In the present case, the officers went to Doty's home because they were investigating a burglary and theft of some guns, and the victim had told them that they may be able to find the suspect at Doty's residence. Based on this information, the officers had been given reason to develop a concern or suspicion that they may find the suspect of the burglary and possibly the stolen weapons at Doty's house. When the front door was opened and Officers Hodge and Widmer observed several weapons inside the house, this suspicion would have grown, especially when two individuals immediately ran for the back of the house after seeing the police. As for the degree of intrusion, it was ultimately substantial, but it was greatly outweighed by the extent of law enforcement needs. As previously stated, when the front door of Doty's house was opened, the officers were met with a scene that posed a danger to their safety. Inside the house, were eight to ten individuals, two of whom were holding handguns. Doty was reaching into a drawer of a table upon which two more guns were located. Therefore, the circumstances posed an immediate threat to the officers' safety

and justified their immediate entry to gain control over the situation. We therefore conclude that, under the totality of the circumstances, the officers' warrantless entry into Doty's home was reasonable.

II. Abuse of Sentencing Discretion

Doty argues that the trial court abused its discretion when it sentenced him. Sentencing decisions are within the sound discretion of the trial court and are reviewed on appeal only for an abuse of that discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)), *clarified on reh'g*. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and the reasonable inferences drawn therefrom. *Id*. We can only review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the relative weight given to these reasons. *Id*. at 491.

A. Aggravating Circumstances

Doty contends that the trial court abused its discretion while sentencing him when it found the following aggravating circumstances: the presence of children; the nature of the firearms discovered in the house; and that Doty repeatedly lied during his trial testimony regarding his knowledge of the drugs, but then wrote a statement to the probation department apologizing for his crime.

The trial court is statutorily authorized to consider each of the factors listed in Indiana Code section 35-38-1-7.1(a) and (b), but "[t]he criteria listed in subsections (a) and (b) do not limit the matters that the court may consider in determining the sentence." Ind. Code § 35-

38-1-7.1(c). Our Supreme Court has long held that "the nature and circumstances of a crime as well as the manner in which the crime is committed" is a valid aggravating factor. *Anglemyer*, 868 N.E.2d at 492. The trial court's finding that it was an aggravating factor that the crime was committed in the presence of children was proper as this was part of the nature and circumstances of the crime. Additionally, the finding that the nature and type of firearms discovered in Doty's home as an aggravating factor was proper as it was part of the nature and circumstances of the crime.

The trial court also found that the fact that Doty had steadfastly denied any knowledge of the crack cocaine when he testified at trial, but later expressed remorse in his statement to the probation department to be an aggravating factor. Our Supreme Court has previously held that a trial court may properly consider a defendant's perjury by failing to "give a 'fully truthful account [ ] of the crime'" as an aggravating circumstance. *Shields v. State*, 699 N.E.2d 636, 639 (Ind. 1998). We therefore conclude that the trial court did not abuse its discretion in the finding of aggravating factors.

B. Failure to Suspend Sentence

Doty also contends that the trial court abused its discretion when it failed to suspend a portion of his sentence. He asserts that the trial court misread Indiana Code section 35-50-2-2 and that it should have suspended ten years of his sentence, so that he should have only received a twenty-year executed sentence.

Indiana Code section 35-50-2-2 states in pertinent part:

> (b) . . . [W]ith respect to the following crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence . . .:
>
> (4) The felony committed was:
>
> (O) dealing in cocaine or a narcotic drug . . . if the court finds the person possessed a firearm . . . at the time of the offense . . . .

Ind. Code § 35-50-2-2(b)(4)(O). Under this statute, a trial court *may* suspend only the portion of the defendant's sentence over the minimum sentence if the defendant committed dealing in cocaine and the trial court finds that the defendant possessed a firearm at the time of the offense.

Here, Doty was convicted of dealing in cocaine as a Class A felony, which has an advisory sentence of thirty years, a minimum of twenty years, and a maximum of fifty years. Ind. Code § 35-50-2-4. Additionally, a finding was made that Doty possessed a firearm at the time of the offense as a jury originally found him guilty of possession of cocaine and a firearm after his trial, but because of double jeopardy concerns, judgment was not entered on that conviction. Further, Doty admitted at trial that he possessed at least two firearms. A decision not to suspend a sentence is reviewable only for an abuse of discretion. *Ables v. State*, 848 N.E.2d 293, 296 (Ind. Ct. App. 2006). Under the statute and the circumstances of this case, the trial court could have suspended a portion of Doty's sentence that was in excess of the minimum sentence of twenty years. However, the trial court was not required to do so, and we do not find that it was an abuse of discretion not to suspend any portion of his sentence in light of the above aggravating circumstances.

III. Inappropriate Sentence

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

Doty argues that his thirty-year sentence was inappropriate in light of the nature of the offense and his character. He specifically contends that, as to the nature of the offense, he was merely a minor drug dealer, that all of the firearms discovered at his home were recently purchased and legally owned and registered, and that the firearms were not intended to be used for criminal conduct but for personal protection. He also asserts that his character showed that he had no prior criminal history, he was only twenty-two years old, he is married and has two children, he maintained consistent employment prior to his arrest, he cooperated with the police, he abided by the terms and conditions of his pretrial release, he had a twelfth grade education, and he expressed remorse in his statement to the probation department.

Looking at the nature of the offense, we note that Doty admitted that he was a drug dealer and that he possessed several firearms. When the police arrived at his home, there were four handguns and two rifles in plain sight in the front rooms of the house. Nearly twenty-five grams of crack cocaine was discovered in the living room, which is over eight times the amount needed for Class A felony dealing in cocaine. Doty's eighteen-month-old

son was present in the house as well as other juveniles. Additionally, the police found other items used in dealing drugs such as digital scales, a razor blade, and plastic baggies.

As to Doty's character, although he did not have a prior criminal history, Doty conducted an inherently dangerous business out of his home by dealing drugs. He also allowed several loaded firearms and large amounts of crack cocaine to be in the same room and within the reach of his toddler son. Further, Doty steadfastly denied any knowledge of the drugs when he testified at trial, but later expressed remorse in his statement to the probation department. This showed a lack of candor and respect for the court. We therefore conclude that, in light of the nature of Doty's offense and the character of the offender, a thirty-year advisory sentence was not inappropriate.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.